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Kye, Edwina, "Freedom of Expression and China's Internet Laws" (2014). *Law School Student Scholarship*. 507.
https://scholarship.shu.edu/student_scholarship/507

Freedom of Expression and China's Internet Laws

Edwina Kye

One single email resulted in ten years of imprisonment for Shi Tao, a journalist for a Chinese newspaper.¹ His sentencing was due to sending information about a Chinese Communist Party Central Propaganda Bureau document (Party document) through his Yahoo! email account.² What was worse was that Yahoo! Hong Kong gave the Chinese government access to Shi Tao's personal email account.³ The content of his email merely contained notes summarizing the Party document, which was discussed at a Contemporary Business News staff meeting he attended.⁴ The Chinese authorities tried Shi Tao under Article 111 of the People's Republic of China Criminal Law for spilling "state secrets" across national borders.⁵ This is just one example, out of many, illustrating the consequences of China's internet censorship through harsh criminal punishment. This leads us to question whether such censorship violates Chinese citizens' their right to freedom of expression on the internet.

Countries may differ on their ideas of freedom of expression on the internet, but it is likely that most or all of them want their countries to have some internet access. Article 19(2) of the International Covenant on Civil and Political Rights (ICCPR) states: "everyone shall have the right to the freedom of expression; this right shall include freedom to seek, receive, and impart

¹ Reporters Without Borders, Information Supplied by Yahoo! Helped Journalist Shi Tao Get 10 Years in Prison, Sept. 6, 2005, [http:// www.rsf.org/article.php3?id_article=14884](http://www.rsf.org/article.php3?id_article=14884).

² Id.

³ Id.

⁴ Human Rights in China: Case Highlight: Shi Tao and Yahoo, [http:// www.hrichina.org/public/highlight/](http://www.hrichina.org/public/highlight/).

⁵ Human Rights in China: Case Highlight: Shi Tao and Yahoo, *supra* note 63.

information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print.⁶ In support of this provision, the United Nations (UN) recently declared that freedom of expression on the internet is a human right.⁷ This declaration was at least in part a response to China's attempts to get the UN to allow internet restrictions for reasons of "public safety and national security."⁸ At the UN Human Rights Council meeting on February 29, 2012, several countries, with China leading the way, took a stronger stance on government intervention of the internet.⁹ At the meeting, China repeatedly emphasized that freedom of expression on the internet is far from absolute.¹⁰ More specifically, China declared that "abuses of this expression can encroach the rights of others," further mentioning the potential dangers of the internet: "terrorism, racism, xenophobia, gaining political advantage, violent information that corrupts people's minds inducing them to engage in criminal activities."¹¹ China then described numerous ways for the government to manage and censor online content.¹² In response to China and in efforts to keep the internet free from strong government intervention, forty-seven members of the UN Human Rights Council pushed for the new declaration and agreed on the right to freedom of expression on the internet.¹³

⁶ International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), 21 U.N. GAOR, 21st Sess., Supp. No. 16 at 52, U.N. Doc. A/6316 (Dec. 16, 1966), *available at* <http://www2.ohchr.org/english/law/ccpr.htm> [hereinafter ICCPR].

⁷ <http://www.regeringen.se/content/1/c6/19/64/51/6999c512.pdf>

⁸ www.ip-watch.org/2012/02/29/un-human-rights-council-rallies-on-right-to-internet-freedom-of-expression/

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ <http://www.smartplanet.com/blog/smart-takes/united-nations-declares-internet-freedom-a-basic-human-right/27613>

Even though this declaration was recently passed, the UN's efforts to limit strong government intervention on the internet are not recent. The UN had held prior panel discussions on ways to promote and protect freedom of expression on the internet before the declaration passing.¹⁴ During such discussions, the United States (US), joined by other European countries [mention which], highlighted the virtues of keeping the internet free, the social and economic advantages of an open internet and their concerns on governments wanting more internet censorship.¹⁵ Although the UN now recognizes the right to freedom of expression on the internet, it acknowledges that this right is not without limits.¹⁶ Article 19(3) states that the right to freedom of expression "carries with it special duties and responsibilities"; it may therefore be subject to certain restrictions, but these shall only be such as are "provided by law and are necessary."¹⁷ Emphasizing this provision, China insists that its internet censorship lies justly under Article 19 and states it is for "the protection of national security or of public order, or of public health or morals."¹⁸

China was significantly behind technology until the internet was first opened to the public in 1995.¹⁹ Today, China has the most number of internet users in the world, about 538 million users to be more exact.²⁰ China's primary concern of allowing liberal freedom of expression on the internet comes from the internet's great potential to affect China's political

¹⁴ Smartplanet.com blog

¹⁵ Smartplanet.com blog

¹⁶ ICCPR, supra note 6, art. 19(3)

¹⁷ ICCPR, supra note 6, art. 19(3)

¹⁸ Id. art. 19(3)(b).

¹⁹ Scott E. Feir, *Regulations Restricting **Internet** Access: Attempted Repair of Rupture in **China's** Great Wall Restraining the Free Exchange of Ideas*, 6 PAC. RIM. L. & POL'Y J. 361, 371-73 (1997); Amy Knoll, *Any Which Way But Loose: Nations Regulate The **Internet***, 4 TUL. J. INT'L & COMP. L. 275, 276 (1996) (examining the varied attempts and efforts by different countries to effectively regulate the **Internet**).

²⁰ <http://www.internetworldstats.com/asia.htm#cn>

system.²¹ The internet is popular for its power to create instant communication without large restrictions. This contrasts with China's political system, which greatly depends on maintaining close control of public information.²² China has been able to maintain such close control of public information through the enactment of many internet laws, restricting broad internet use and any other online content it deems illegal. Even with such strict censorship, however, internet users have been able to get around some of them. With the intention of further strengthening China's internet censorship regime, the government recently enacted a law in December 2012 that requires internet users to provide their real names to service providers.²³

This article will note the severity of China's internet censorship regime through scholarly opinions and summarize scholarly proposals on addressing this severity. This paper will analyze the new law from a legal perspective and determine whether or not the right to freedom of expression on the internet includes the right to post under fake names. It will also analyze the new law under a technological perspective and predict the effects of the new law in conjunction with the internet censorship regime as well as on its own.

Part one of this article will introduce the severity of China's internet censorship regime and note scholarly opinions on the severity of this regime. This part will also describe the new law from the perspective of common folks and critics. **Part two** will introduce the new law and describe how the new law adds to China's overall internet censorship. This part will also include the Chinese government's reasons as to why the new law is needed. **Part three** will describe

²¹ John H. Taylor III, *The Internet in China: Embarking on the "Information Superhighway" with One Hand on the Wheel and the Other Hand on the Plug*, 15 DICK. J. INT'L L. 621, 625 (1997) (discussing the balance between allowing progress and allowing harmful content on the Internet).

²² Scott E. Feir, *Regulations Restricting Internet Access: Attempted Repair of Rupture in China's Great Wall Restraining the Free Exchange of Ideas*, 6 Pac. Rim. L. & Pol'y J. 361, 371-73 (1997).

²³ <http://www.nytimes.com/2012/12/29/world/asia/china-toughens-restrictions-on-internet-use.html>

scholarly opinions on how China's internet laws can be addressed to reduce the severity of the problem noted in part one. **Part four** will note my prescriptive contributions under a legal/human rights point of view and a technological point of view. This part will conclude that, according to international legal norms, the new law violates freedom of expression on the internet because this right includes the right to post under fake names. It will further posit that the Chinese government's definition of freedom of expression is narrow in comparison to international norms. This part will also argue that the Chinese government is moving further away from international laws based on their purpose/intent of enacting the new law—to further internet censorship. Moreover, although the new law is problematic under international legal norms, I will predict that the new law will not be much of a concern from a technological point of view, and that the new law will not create a marked worsening of internet censorship. Lastly, I will note China's limits in effectively using the new law to contribute to internet censorship and indicate how the law lags behind technology. **Part 5** will provide further comments.

PART 1 – CHINA'S STRICT INTERNET CENSORSHIP REGIME

China's internet laws, in conjunction with this new law, becomes a problem when certain internet content is restricted even absent "illegitimate purposes" stated under international norms (i.e. threats to national security, public order, or defamation) and internet users are harshly criminally punished. China is violating international human rights norms by censoring more than what is "appropriate or acceptable" under international human rights law.

Scholarly opinions on the severity of China's internet censorship regime

China's blocking or filtering of websites is excessive and thereby impedes on the rights of their citizens to freedom of expression on the web. In addition to using the internet for the many benefits it naturally provides, China's security agencies are also using it as a tool to track

down and punish political dissidents.²⁴ Prominent search engines in China, such as Yahoo!, filter web content by blocking particular results from coming up or preventing users from searching certain terms such as “democracy,” “freedom,” “human rights,” and “demonstration.”²⁵ Similarly, blog service providers in China also prohibit posts with specific keywords and edit blog posts to take out certain words they deem inappropriate.²⁶ The country even recruits teams called “big mamas” to censor Yahoo!-hosted Internet chat rooms to delete comments from political dissidents as well as to have them warn such users.²⁷ There are also “cybercops” hired to roam the web to block out foreign and domestic websites that contain undesirable political information, even including foreign news sites.²⁸ This is all to say that China’s internet censorship is strict and excessive. When internet censorship blocks more than the specified information, the application of such censorship becomes too broad and over-inclusive. This contributes to a violation of freedom of expression on the internet, especially when citizens are not provided with any opportunity for court review on such censorship.²⁹

PART 2— THE ADDITION OF THE NEW LAW

Requiring internet users to use their real names on the internet may be just one more way for China to regulate and censor certain materials from its citizens. The December 2012 internet law requires internet users to use real names with service providers who register for wireless, landline, or cell phone internet connections.³⁰ The law further requires internet companies to take greater roles in filtering online content by deleting postings deemed illegal and also reporting

²⁴ Internet Filtering in China, *supra* note 4, at 51

²⁵ Internet Filtering in China, *supra* note 4, at 4.

²⁶ Internet Filtering in China, *supra* note 4, at 3.

²⁷ Tkacik, Jr., *supra* note 6, at 6.

²⁸ Tkacik, Jr., *supra* note 6, at 6-7.

²⁹ Special Rapporteur on the promotion and protection of the right to **freedom** of opinion and **expression**, *Report of the Special Rapporteur on the promotion and protection of the right to **freedom** of opinion and **expression**, delivered to General Assembly*, U.N. Doc. A/HRC/17/27 (May 16, 2011) [hereinafter *Report of the Special Reporter*]

³⁰ <http://www.nytimes.com/2012/12/29/world/asia/china-toughens-restrictions-on-internet-use.html>

these users to authorities.³¹ Prior to this law, internet users would get away with posting certain content online by creating accounts under fake names.³² With the addition of the new law, however, it now enables personal details of the internet user to be sent to the government for punishment.³³ The government states the purpose for the new law is so that “illegal” activities from the account can be directly traced to the user.³⁴ Depending on from whose perspective the new law is viewed, the new law is either for the benefit or to the detriment of internet users.

The new law from the perspective of common folks and scholars

The Chinese government claims that the new law is for the protection of its citizens—to prevent identity theft, spam mail, transmission of “illegal” information— rather than mere censorship.³⁵ However, from the perspective of Chinese citizens and scholars, the new law is not wholly beneficial for internet users as the Chinese government may claim it is to be. Instead, the new law creates one more hurdle in enabling internet users from easily accessing the internet. It also discourages users from using the internet even if their use is legitimate and also raises the danger of excessive internet blocking.³⁶ Furthermore, the new law hinders Chinese journalists, reporters, and even US internet companies based in China from doing their jobs.³⁷

The new law creates a problem for Chinese citizens and scholars because it takes away anonymity from the internet. Allowing for fake names and or screen-names makes the internet more readily accessible to those who do not want to use their real names, despite whatever their

³¹ Id.

³² Id.

³³ Id.

³⁴ Id.

³⁵ <http://www.voanews.com/content/china-to-require-real-name-internet-registration/1573660.html>

³⁶ Special Rapporteur on the promotion and protection of the right to **freedom** of opinion and **expression**, *Report of the Special Rapporteur on the promotion and protection of the right to **freedom** of opinion and **expression**, delivered to General Assembly*, U.N. Doc. A/HRC/17/27 (May 16, 2011) [hereinafter *Report of the Special Reporter*]

³⁷ <http://www.voanews.com/content/china-to-require-real-name-internet-registration/1573660.html>

reason may be.³⁸ Additionally, it provides web users with a more wholesome experience of the internet, specifically by giving them more choice and control in their online activities.³⁹

Regarding human rights concerns, the new law requiring real names will restrict Chinese citizens from fighting off governmental corruption and abuse by reporting them online anonymously.⁴⁰

Furthermore, enabling anonymity is essential in order to protect victims of abuse from perpetrators and in maintaining and respecting individual privacy.⁴¹

Chinese government's defense in needing the new law

The Chinese government, however, thinks differently. It indicates that the new law is necessary and cites Article 19(3)—that freedom of expression “carries with it special duties and responsibilities.”⁴² It argues that this right may be subject to certain restrictions “as are provided by law and are necessary”.⁴³ The provision specifically allows for “legitimate” restrictions deemed under international law for “the protection of national security or of public order, or of public health or morals.”⁴⁴ China declares that their concerns with national security and maintaining public order justifies the enactment of the new law and that it satisfies as a “legitimate” restriction. It also argues that the new law does not focus solely on censoring political information. Instead, they state that the new law and all of their other internet laws have effectively helped to keep out harmful content that the majority of Chinese citizens do not support, such as child pornography, users who try to incite violence, and the reduction of spam

³⁸ <http://bits.blogs.nytimes.com/2012/01/23/in-a-switch-google-plus-now-allows-pseudonyms/>

³⁹ *Id.*

⁴⁰ <http://www.voanews.com/content/china-to-require-real-name-internet-registration/1573660.html>

⁴¹ <http://bits.blogs.nytimes.com/2012/01/23/in-a-switch-google-plus-now-allows-pseudonyms/>

⁴² ICCPR, *supra* note 6, art. 19(3).

⁴³ *Id.*

⁴⁴ *Id.* art. 19(3)(b).

emails.⁴⁵

In addition to what the Chinese government argues, authorities can defend the new law by stating that the law does nothing more than require real names of internet users—information users should be easily willing to provide if they have nothing to hide. Furthermore, the Chinese government can look to other major online systems such as Google+ and Facebook which have been requiring real name registration to prevent negative internet use and place consequences on internet users who tend not to fear consequences of negative use.⁴⁶ YouTube has also joined the bandwagon and has been recently pushing for the real name requirement for posting comments.⁴⁷ Google+, Facebook, and YouTube are all big internet outlets that readily made available for countries that do not support strong government intervention on the internet, unlike China. China can argue that the new law does nothing different from what Google+, Facebook and YouTube already requires.

Moreover, the Chinese government can argue that more internet laws are needed because they have not been successful in completely restricting “illegal” content deemed under international norms.⁴⁸ Internet users are always looking to get around internet restrictions

⁴⁵ Antone Gonsalves, Chinese Web Users Slow to Buy, Quick to Have Fun (Nov. 17, 2005), <http://informationweek.com/story/showArticle.jhtml?articleID=174400176>. See also Bobson Wong, A Matter of Trust: The Internet and Social Change in China 2 (2003), available at <http://www.hrichina.org/public/contents/10351> (last visited Dec. 18, 2006) [hereinafter Wong, Matter of Trust]. “[C]ensorship is neither as extreme nor as unpopular in China as many Westerners might think.”

⁴⁶ http://www.huffingtonpost.com/2012/07/24/youtube-real-names-users-comments_n_1699749.html; <http://www.howtovanish.com/2011/09/facebook-and-fake-names/>

⁴⁷ Id.

⁴⁸ *Internet, Chinese Style: Rapid Growth, “Wild West” Atmosphere, But Will It Open Up Info Flows?*, 20 No. 7 E. ASIAN EXEC. REP. 8 (1998) (noting that national pride has been a factor in driving the development of the Internet in China, and citing a report in the *People’s Daily* that expressed concern that developing countries may fall further behind as other developed countries benefit from science and technology).

through various methods. Users are utilizing servers to reroute connections to other computers using internet relay chats (IRCs), thereby allowing instantaneous sending of data to other internet users.⁴⁹ It is also almost close to impossible for the government to observe and screen immediate chats among millions of users through IRCs.⁵⁰ Users are also getting around restrictions by accessing foreign Internet service providers (ISPs) through cellular phone lines. Lastly, ISPs cannot be useful in monitoring online use to know whether or not such activity is deemed illegal but not yet blocked.⁵¹

Additionally, the Chinese government can argue that the new law does not actually censor content on the internet, but rather makes it easier to track down users who use it for “illegitimate” purposes and ensures more safety online.⁵² The new law creates less work for the Chinese government in tracking down illegal use of the web and allows a more efficient monitoring as opposed to the other monitor methods in place such as “Cybercops” and Big Mama’s.”⁵³ The new law also provides benefits to internet users. Victims of defamation can more readily find justice and perpetrators of such and users of pornography can be more easily tracked and punished.⁵⁴ More importantly, the government can argue that the new law is within the realm of providing Chinese citizens the right to internet expression. International law has indicated that the internet cannot be limitless nor have absolute freedom. Therefore, the new law requiring real names to internet service provides does not out rightly violate this right.⁵⁵

⁴⁹ China's Internet Information Skirmish, A January 1998 Report from U.S. Embassy Beijing, at <http://www.usembassy-china.org.cn/english/sandt/webwar.htm> (last visited Jan. 4, 2001).

⁵⁰ See Feir, *supra* note 19, at 378.

⁵¹ Mo Zhang, *China Issues New Rules Strengthening Regulatory Structure over the Internet*, 19 E. ASIAN EXEC. REP. 9 (1997).

⁵² http://www.cncworld.tv/news/v_show/30692_China_s_cyber_security_debate:Effects_of_real-name_registration.shtml

⁵³ Id.

⁵⁴ Id.

⁵⁵ Id.

PART 3 – SCHOLARLY PROPOSALS ON ADDRESSING SEVERITY OF CENSORSHIP

Scholars have recommended various ways on how China's internet censorship regime can be loosened. Scholars have suggested that diplomatic and domestic pressure might have some impact. The US should continue to put diplomatic pressure on the Chinese government and on US based companies in China to stop adhering to China's internet censorship standards.⁵⁶ The latter can be achieved through tight regulation of software being exported to China particularly software used to monitor.⁵⁷ US businesses such as Google, does not hurt from adhering to China's internet censorship standards. Rather, it benefits from their existing business in China as opposed to not having its presence in China at all. However, due to human rights concerns, the US has started to help fund organizations that help get around the "Great Firewall." [CITE] Domestic pressure can also be placed on China through the Global Internet Freedom Act of 2003 (GIFA).⁵⁸ GIFA would be used as a basis for US corporation liability for companies such as Yahoo! and Google working in China. GIFA declares that the US should "publicly, prominently, and consistently denounce governments that restrict, censor, ban, and block access to information on the Internet." ⁵⁹

In addition to the pressure received from the US, changes from Chinese citizens and dissident internet users themselves, are strong advocates for seeing some change in China's internet censorship. This is evidenced in technology-savvy internet users who are constantly trying to find ways around internet censorship. A few examples include cyberdissidents using virtual private networks (VPNs) despite the Chinese government cracking down on their use and

⁵⁶ Big Mama

⁵⁷ Big Mama

⁵⁸ Global Internet Freedom Act, H.R. 48, 108th Cong. (2003).

⁵⁹ Id. § 5(1).

through China's largest web chat room made available at Sina.com.⁶⁰

Another act, the Alien Tort Claims Act (ACTA) is also one potential solution to loosening China's strict internet censorship regime.⁶¹ As ACTA enables district courts to have "original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States," Chinese citizens can sue US businesses in China for violating freedom of expression on the internet.⁶²

An industry-wide code of conduct, i.e. international action, is an alternative solution proposed by scholars. Internet companies around the world can work collectively to brush off the Chinese government's pressure on such companies to adhere to their standards.⁶³ Scholars note that an industry-wide code of conduct can be made when global internet companies ascertain substantive categories of speech to be regulated.⁶⁴ Scholars predict that a global consensus of such categories can be achieved due to particular core values all international community subscribes to, such as informational autonomy and quality.⁶⁵ In addition to the categories, the code of conduct, although voluntary, should bind global internet companies to certain terms so that it creates global practices and standards, thereby affecting the internet industry as a whole.⁶⁶ This code that each company voluntarily binds itself to would enable corporate responsibility, as well as act as a safeguard for companies placed in countries where freedom of

⁶⁰ Michael A. Lev, Unusual Challenge in China; A University Student Known as the 'Stainless Steel Mouse' Remains Jailed After Pushing Free Speech on the Internet. A Gadfly, Claiming his 'Right to Know,' Presses Police to Explain, Chi. Trib., Nov. 12, 2003, at C4.

⁶¹ **Alien Tort** Claims Act, 28 U.S.C. § 1350.

⁶² *Id.*

⁶³ Breaching the great firewall of China

⁶⁴ Viktor Mayer-Schönberger & Tere E. Foster, *A Regulatory Web: Free Speech and the Global Information Infrastructure*, 3 MICH. TELECOMM. & TECH. L. REV. 45 (1997), available at <http://www.mttl.org/volthree/foster.html>.

⁶⁵ *Id.* at 57.

⁶⁶ HUMAN RIGHTS WATCH, "RACE TO THE BOTTOM" CORPORATE COMPLICITY IN CHINESE INTERNET CENSORSHIP 3 (2006), available at <http://www.hrw.org/reports/2006/china0806/>.

expression is restricted.⁶⁷ More importantly, the code will allow companies to refute off the pressure by governments who restrict political opinion and thereby not aid in internet censorship.⁶⁸

In order for restrictions on the internet to be legitimate under international norms, they should also be a proportionate.⁶⁹ In other words, the restriction should only block out the specific “illegitimate” content and not prohibit information more than necessary. In conjunction, restrictions should never be placed without any just cause.⁷⁰ The Chinese government can do a better job in clearly defining illegal activities and making these regulations understandable and available to Chinese citizens. Additionally, the Chinese government should limit criminal punishment for objectionable internet use only to “legitimate” restrictions allowed under international law such as child pornography, hate speech, and incitement to violence etc.⁷¹

PART 4 – MY PRESCRIPTIVE CONTRIBUTIONS

Analyzing the new law under a legal perspective

a. The right to freedom of expression includes the right to post under fake names

Sometimes people want to post on the internet something they would not want to say or write elsewhere. The internet medium provides just this, a place for open expression. But requiring real names from internet users creates one more hurdle in readily accessing the internet. It has the ability to discourage users from using the internet even if their use is legitimate. As more and more limitations are placed on the internet, it inhibits internet users of

⁶⁷ Id.

⁶⁸ *China: Internet Companies Aid Censorship*, Human Rights Watch, Aug. 10, 2006, available at <http://hrw.org/english/docs/2006/08/09/china13940.htm>.

⁶⁹ Internet as a human right- young joon lim; ICCPR

⁷⁰ Internet as a human right, young joon lim; ICCPR

⁷¹ Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, *Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, delivered to General Assembly, U.N. Doc. A/HRC/17/27* (May 16, 2011) [hereinafter *Report of the Special Reporter*].

the open expression the internet provides by not only making them more cautious in their use but actually limiting the scope of their use. Of course the internet cannot be limitless, and internet users are aware that certain use of the internet is not allowed. However, in light of human rights concerns, China's new law requiring real name registration on the internet certainly contributes to impeding freedom of expression on the internet, as this right includes the right to post under fake names.⁷²

As the new law takes away users' rights to post anonymously, it contravenes international norms that declare such freedom of expression on the internet as a human right. Allowing for fake names makes the internet more readily accessible to those who do not want to use their real names, despite whatever their reason may be, but also assuming their use is legal under international laws.⁷³ Additionally, it provides internet users to obtain an experience they desire with the internet specifically by allowing them more choice and control in their online activities.

⁷⁴

[Need to do more work in this section. Having trouble finding information that specifically indicates that this right includes the right to use fake names.]

The Chinese government's narrow definition of freedom of expression

In a December 2009, the Chairman of the Social Issues Research Center at the China Academy of Social Sciences declared in a speech to the Beijing Law Association that there was no freedom of expression on the internet in China, but it was rather a tool to serve the purposes of the government. Furthermore, he indicated that China had the internet only because it "did not

⁷² <http://aclu-wa.org/student-rights-and-responsibilities-digital-age-guide-public-school-students-washington-state#IA>

⁷³ <http://bits.blogs.nytimes.com/2012/01/23/in-a-switch-google-plus-now-allows-pseudonyms/>

⁷⁴ Id.

have a choice.”⁷⁵ An example of such declaration was evidenced in Xinjiang in 2009 after an ethnic violence when the government shut off the internet service there for 18 months. The Chinese government defended such action by saying that it wanted to “prevent violence from spreading to other places.”⁷⁶

Only on paper does the Chinese government place “legitimate” internet restrictions on the internet: content or use that “harms the honor or interests of the nation, spreads rumors, or disrupts national policies on religion.”⁷⁷ Not surprisingly, the government does not like to define these terms nor do Chinese laws elaborate or explain what they are.⁷⁸ When the government formed the “Rules on the Administration of Internet News Information Services” in 2005, it mandated news publishers—both individuals and organizations to get approval from the government. The government’s mere purpose in enacting these rules was because they were beneficial to the State, socialism, and “correctly guiding public opinion.”⁷⁹

In addition, the government uses ambiguously worded criminal law provisions to restrict freedom of expression, enabling citizens unable to decipher what is restricted and what is allowed on the internet.⁸⁰ The Chinese government however, has admitted that their laws

⁷⁵ “Yu Jianrong: Maintaining a Baseline of Social Stability, (Part 8)” Translation of a speech to the Beijing Lawyers Association, December 26, 2009, <http://chinadigitaltimes.net/2010/03/you-jianrong-%E4%B8%A5%E5%BB%BA%E5%B5%98-maintaining-a-baseline-of-social-stability-part-8/> (accessed November 7, 2010)

⁷⁶ “Internet in Xinjiang Resumes,” Straits Times, December 29, 2010, http://www.straitstimes.com/BreakingNews/Asia/Story/STIStory_471543.html (accessed November 7, 2010); “Official: Internet cut in Xinjiang to prevent riot from spreading,” Xinhua News Agency, July 7, 2010.

⁷⁷ Measures for the Administration of Internet Information Services [Hulianwang xinxi fuwu guanli banfa], issued 20 September 00, effective 25 September 00, art. 15.

⁷⁸ See, e.g., a November 2010 China Daily article that notes the concerns of one Chinese professor, who said there is a need for specific laws to determine when citizens have “spread rumors.” Li Xinzhu, “Latest Batch of Rogue Netizens Exposed,” China Daily, 3 November 10.

⁷⁹ <http://www.ethicsworld.org/corporatesocialresponsibility/PDF%20links/Amnesty.pdf>

⁸⁰ <http://www.cecc.gov/pages/annualRpt/annualRpt11/AR2011final.pdf>

disallow even peaceful expression and or criticism of the Communist Party.⁸¹ More specifically, their main purpose for strict internet censorship is to prevent any “discussion of government policies and political debate, peaceful demonstrations or political activities, including for peace and democracy, and expression of dissent.”⁸² Chinese authorities will, and certainly have in the past, resorted to harsh criminal punishment on internet users to deter such peaceful criticism of the Party on the internet.⁸³ A court in Xinjiang silenced three Uighur bloggers and convicted them based on another ambiguous state law for “endangering state security.”⁸⁴ These bloggers did not act quick enough in taking down their postings on their websites about the difficulties faced in Xinjiang and received three to ten year sentences as a result.⁸⁵ Similar harsh punishment are evidenced in the criminal charges many Chinese journalists have faced and continue to face regarding their internet use for “revealing state secrets” and or “inciting subversion.”⁸⁶

a. The new law brings the Chinese government further away from international laws

In 2006, the Amnesty International of UK recognized a decline in China’s human rights. This deterioration has only further increased today. Not only are Chinese journalists being detained, but so are defenders of human rights all for their use of the internet.⁸⁷ Amnesty International believes that at the very least, 54 internet users were imprisoned at the time for simple human rights acts such as signing petitions and spreading health information—SARS. 31

⁸¹ Id.

⁸² Id.

⁸³ <http://www.nytimes.com/2012/12/29/world/asia/china-toughens-restrictions-on-internet-use.html>

⁸⁴ Phelim Kine (Human Rights Watch), “China’s Journalists Under Threat,” commentary, Washington Times, September 2, 2010.

⁸⁵ Andrew Jacobs, “China Imprisons 3 Men Who Maintained Uighur Web Sites,” New York Times, July 31, 2010.

⁸⁶ 135 Phelim Kine (Human Rights Watch), “China’s Journalists Under Threat,” commentary, Washington Times, September 2, 2010, <http://www.hrw.org/en/news/2010/09/02/chinas-journalists-under-threat>.

⁸⁷ <http://www.ethicsworld.org/corporatesocialresponsibility/PDF%20links/Amnesty.pdf>

[citation= ibid.]⁸⁸ The Chinese government also produced the National Human Rights Action Plan (NHRAP) in 2009 which it radically failed to keep up with the set-forth goals. The plan declared goals for human rights action as well as a timeline of when to take action.⁸⁹ The NHRAP notes China's room for improvement on various human rights issues, including internet control and the right for people to be informed.⁹⁰ But with the way the government has handled internet censorship and continues to handle today, China is less concerned with human rights and adhering to international laws and more concerned about appearing to look the part.

The Chinese government defines freedom of expression in a way that is inconsistent to international law standards. This is evident from the broad and vague range of limitations they place in the internet. While international norms indicate that the right to freedom of expression is not absolute and may restrict for purposes of upholding national security and public order, the government's restrictions are much more expansive, and it even includes disallowing peaceful expression critical of the Communist Party.⁹¹ Article 19 of the ICCPR further allows for restrictions on this right as long as it is forth in law, required, and the least restrictive means to achieve their goal.⁹² The UN Human Rights Council has specifically indicated that restrictions simply from Chinese authorities' finding something offensive or to pose a risk to public order such as discussions of politics or peaceful political do not conform with Article 19 of the

⁸⁸ <http://www.ethicsworld.org/corporatesocialresponsibility/PDF%20links/Amnesty.pdf> [source cited 'ibid']

⁸⁹ <http://www.hrw.org/sites/default/files/reports/china0111webwcover.pdf>

⁹⁰ Id.

⁹¹ <http://www.cecc.gov/pages/annualRpt/annualRpt11/AR2011final.pdf>

⁹² ICCPR; The UN Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression has also used this three-factor test to describe the standard for determining when a restriction is permissible under Article 19, paragraph 3, of the ICCPR. UN Human Rights Council, Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, Frank La Rue, 16 May 11, A/HRC/17/27, para. 24.

ICCPR.⁹³ As the ICCPR clearly indicates, strict restrictions as the ones China imposes on its citizens must be written down in the law, have a reasonable purpose and be a proportionate response.⁹⁴

There is a great problem of transparency and clarity with China's internet censorship laws. The new law enables the government direct access to personal information of the internet user, but because internet users do not know what is censored, what should be censored but not yet censored, or what is even "illegal" internet use, more internet users will be criminally punished without even realizing that their internet use was illegal. The consequences of the new law will go against ICCPR's allowed restrictions.⁹⁵ Not only does China's definition of freedom of expression on the internet affect Chinese internet users and journalists, it also affects internet companies based in China. The purpose of their internet censorship laws, as well as the new law requiring users to provide real names, is to place more responsibility on internet companies—not just internet service providers, but on content providers in filtering web postings and content, deleting and blocking certain content based on vague standards of law, and keeping track of illegal activity and report it to the government.⁹⁶

Going against international and human rights standards, the Chinese government continues to impermissibly restrict freedom of expression on the internet with the sole purpose of

⁹³ UN GAOR, Hum. Rts. Coun., 12th Sess., Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development, adopted by Human Rights Council resolution 12/16, A/HRC/RES/12/16, 12 October 09, para. 5(p)(i).

⁹⁴ ICCPR

⁹⁵ ICCPR

⁹⁶ 135 Phelim Kine (Human Rights Watch), "China's Journalists Under Threat," commentary, Washington Times, September 2, 2010, <http://www.hrw.org/en/news/2010/09/02/chinas-journalists-under-threat>; 7 Measures for the Administration of Internet Information Services [Hulianwang xinxi fuwu guanli banfa], issued 20 September 00, effective 25 September 00, arts. 15–16; Provisions on the Administration of Internet News Information Services [Hulianwang xinwen xinxi fuwu guanli guiding], issued 25 September 05, effective 25 September 05, arts. 19–21.

preventing peaceful criticism of the Communist Party. Further, the government does not exhibit any signal of relaxing governmental control on the Internet. Instead, internet censorship trends indicate further solidifying governmental regulations on censoring politically sensitive information and more keywords relating to human rights. The UN Special Rapporteur on promoting and protecting freedom of expression has also declared restraints be done by a neutral party and remedy potential exploitation.⁹⁷ China, however, does not have an independent body to provide checks on government abuse, nor does the government provide citizens a way to appeal to have certain internet content and keywords unblocked.⁹⁸

Analyzing the new law under a technological perspective

a. The new law will not be effective under a technological point of view and will not be a marked worsening of internet censorship in China

From a technological point of view, the new law requiring real names be given to internet service providers is very easy to get around. How will they know what is a real name or a fake name? Whether or not internet users will abide by the law will most likely depend on whether or not the government will be able to catch a fake name. However, the new law certainly will have a deterrence effect on internet users. Although this new law does not depict a new trend in the government's censorship strategies, it may be more of a legal tactic to scare its citizens to abide with the many other prior censorship laws.

⁹⁷ In its May 2011 report, the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression stated that "any legislation restricting the right to freedom of expression must be applied by a body which is independent of any political, commercial, or other unwarranted influences in a manner that is neither arbitrary nor discriminatory, and with adequate safeguards against abuse, including the possibility of challenge and remedy against its abusive application." UN Human Rights Council, Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, Frank La Rue, 16 May 11, A/HRC/17/27, para. 24.

⁹⁸ <http://www.cecc.gov/pages/annualRpt/annualRpt11/AR2011final.pdf>;
<http://www.ethicsworld.org/corporatesocialresponsibility/PDF%20links/Amnesty.pdf>

From a practical point of view, the new law acts as one more hurdle for internet users to get over. Taking into account the many hurdles and restrictions the government places on internet use/access, will one more make a difference? Internet companies still have the power to provide (as Yahoo! HK has done before) to the Chinese government access to users' personal email accounts in order to track them down. Despite human rights concerns and organizations' efforts, internet companies still hold the power to give out personal information of their users. With that said, the Chinese government can still regulate and maintain strict internet censorship even without citizens abiding the new law.

China's limits in effectively contributing to internet censorship with the new law

As pointed out in the above, the new law requiring real names of internet users will be easy to get around under a technological point of view. Acknowledging the deterrence effect the new law may have on internet users, the new law by itself and on its face still does little to contribute to China's internet censorship regime. Only when the new law is placed in conjunction to China's internet censorship as a whole, does the new regulation become a stronger method of regulating the internet in China. Another weakness to the new law is that it brings with it the potential to increase the risk leaking of personal information and personal information theft.⁹⁹ Due to the potential ability of the new law in putting users' personal information and identity more at risk, it offers internet users an additional fear that is different from the fear of being punished by the government for objectionable internet use.¹⁰⁰ Even so, the deterrence effect would be similar, it can inhibit users from posting anything altogether, not just filtering what they use or post on the internet. Taking into consideration China's primary intent in passing their prior internet censorship laws, the new law alone does little to contribute to a

⁹⁹ http://www.cncworld.tv/news/v_show/30692_China_s_cyber_security_debate:Effects_of_real-name_registration.shtml

¹⁰⁰ Id.

marked worsening of China's internet censorship. Furthermore, the use of real names on the internet is already in place. Chinese internet users which account for more than 538 million people are providing their real names when shopping online.¹⁰¹ The new law also backfires against the government as online discussions of officials and their suspicious actions have been followed up on and investigated, enabling government officials to fear the internet.¹⁰² This is all to say that the enactment of the new law itself is not effective on its face but only in combination of China's internet censorship regime.

The law will always lag behind technology

Can any law keep up with technology? Despite the Chinese government's efforts in strengthening their internet censorship regime with the enactment of the December 2012 law, we see from the above that the new law is limited. Technology is constantly advancing, far surpassing the rate of any government passing new laws that are quickly effective. More and more people every day are learning how to get around the new systems that are put in place. Even without advanced technology, the new law is very easy to get around from a technological point of view. It is difficult for the government to determine whether the names provided are real or false. This is all to say that the new law will not have the type of impact the government had expected it would have in contributing to internet censorship because of technology.

PART 5 – FURTHER COMMENTS

¹⁰¹ Id; <http://www.internetworldstats.com/asia.htm#cn>

¹⁰² <http://www.voanews.com/content/china-to-require-real-name-internet-registration/1573660.html>